Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

88-1373

No.

UNITED STATES SUPREME COURT

October Term 1988

AMERICAN BICYCLE COMPANY, INC.

and

PAUL A. BURKE,
Petitioners

v.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

to

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

For Petitioners,
John J. Jennings
Counsel of Record
and Thomas C. Stover
c/o 13 Essex Street
Marblehead, MA 01945
(617) 631-1111

Now come the above Petitioners, herein Plaintiffs and request that a Writ of Certiorari issue relative to an Order of the U. S. Court of Appeals for the 1st Circuit as set forth below pursuant to U.S. S.Ct. 21:

.1 (a) Questions Presented for Review:

(1) Whether the U. S. Court of Appeals, First Circuit, under U.S. SCt. R 17.1(a), improperly denied Plaintiffs' Writ of Mandamus complaining of the U. S. District Court of Massachusetts' Order of Transfer of Venue (in the below action, from that Court to the U. S. District Court in Texas) as an abuse of discretion on the grounds:

a) That the first-named District Court issued such Order of Transfer without having read Plaintiffs' (timely filed) Opposition relative thereto, and

b) On Plaintiffs' Motion for Reconsideration thereof, stating such Opposition had not been read and requesting a hearing thereon; denying said Motion without permitting the Plaintiffs a hearing to present their case against such transfer, or

(2) Whether the District Court abused its discretion in not permitting the Plaintiffs an opportunity for a hearing to present their case against venue transfer.

(b) Parties:

The Petitioners are Plaintiffs in the following action in the U. S. District Court, District of Massachusetts:

AMERICAN BICYCLE CO., INC.[1]
and
PAUL A. BURKE, Plaintiffs
v.
United States of America, Defendant
Civil Action No. 88-0690-MA

[1] The Plaintiff corporation is not a parent, subsidiary, affiliate or otherwise related to any other company or corporation.

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(per USSCT Rule 21.1)

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(d) Opinions Below

This Petition is brought relative to an Order of the U. S. Court of Appeals, First Circuit, denying the Plaintiffs' Petition for Writ of Mandamus, which Denial was issued on November 4, 1988.

The Mandamus Petition complained of an Order of the U. S. District Court of Massachusetts, transferring venue from that Court to the U. S. District Court in Southern Texas, entered on June 14, 1988, followed by the Mass. District Court's Denial of Plaintiffs' Motion for Reconsideration thereon, which Denial was entered on July 20, 1988.

(e) Jurisdiction

This Writ is brought under U.S. S.Ct. Rule 17, as the above-noted decision of the U. S. Court of Appeals, 1st Circuit, is believed to conflict with a decision of the Court of Appeals, 10th Circuit, in a similar situation, as set forth more fully in (g) below.

Numerous cases uphold this ground for issuance of a Writ of Certiorari. For examples:

1) It has been held that conflict with decisions of other Courts of Appeals compelled the U. S. Supreme Court to grant Certiorari for review of a decision of a certain Court of Appeals, FTC v. Flotill Products, Inc., (Cal. 1967), 88 S.Ct. 401,389 U.S. 179, 19 L.Ed. 2(d) 398.

2) It has further been held that the U. S. Supreme Court may speak with authority to assure uniformity of

Federal Law among several circuits and districts, U.S. v. R.J. Reynolds Tobacco Co., DCNJ 1976, 416 F. Supp. 316.

(i) The Order of the Court of Appeals 1st Circuit, was entered on November 4, 1988.

(iv) Jurisdiction for this Petition is conferred by 28 USC 1254(1) within the time limits of 28 USC 2101(c).

(f) Statutes and Regulations:

Applicable statutes and regulations include those cited above in (e) and 15 USC 634(b) 1, and 28 USC 1346, 1402, as well as 28 USC 1651 and FRAP 21, the pertinent text of which is set forth verbatim in the Appendix.

(g) Statement of Material Facts:

As set forth more fully in the Complaint, the Plaintiffs brought an action against the Defendant U.S. SBA

for reneging on the payment of certain promised loan proceeds. The Plaintiffs had entered into a loan agreement with the SBA in its Harlingen, Texas office, to fund manufacturing of a folding bicycle in a plant in Harlingen, Texas. At all times the Plaintiffs and the officers and directors of ABC, Inc. but one, were and are residents of Massachusetts.

As set forth more fully in the Complaint, the Defendant SBA reneged on part of the promised loan proceeds which caused Petitioner American Bicycle Company, Inc., herein Plaintiff ABC, Inc., to lose its lease to the plant in Brownsville, Texas, to close its doors and to relocate in Massachusetts by June, 1987.

In March, 1988 the Plaintiffs brought the present action against the Defendant SBA in the U. S. District

Court, District of Massachusetts. The Defendant responded by bringing a Motion to Dismiss the action on about May 16, 1988. The Defendant alleged that such action encompassed the same issues to be resolved in a pending action in the Southern District of Texas, Dyna-Go Properties, Inc. v. the United States Small Business Administration, CA B-87-242. The Defendant further alleged that it had interpleaded the Plaintiffs herein, as third party defendants. In fact, the Defendant had only brought a Petition for Interpleader, which has not yet been acted upon. Further, the Defendant omitted to say that it had sought to be excused from the Texas action by requesting a dismissal as to it.

On June 2, 1988, the Plaintiffs herein filed an Opposition to the Defendant's Motion to Dismiss, stating

that contrary to the Defendant's assertion, the Texas action did not encompass the same issues to be resolved in the present Massachusetts action. That is, the Texas action concerned an oral lease alleged between Dyna-Go Properties, Inc. and the US SBA, while in the Massachusetts action, the Plaintiffs were and are seeking recovery from the US SBA on certain promised loan proceeds. Accordingly, the same issues were not pending among the same parties but rather different issues were and are pending among different parties in the two actions.

In such Opposition, the Plaintiffs pointed out these discrepancies to the U. S. District Court and noted they had filed an Answer to the US SBA's Petition for Interpleader in the Texas Court and appended a copy of such Answer to the Opposition.

The Plaintiffs further pointed out that ABC, Inc. had been relocated in Massachusetts for over a year and that the majority of the Board of Directors and the President and other witnesses have always been residents of Massachusetts.

The Plaintiffs also stated in such Opposition, that the Plaintiffs who have limited funds, would be burdened with added expense and inconvenience in pursuing their Complaint, while the Defendant, having the unlimited resources of the U. S. Government including the U. S. Attorney's Office in Boston, would experience much less hardship in defending the action in the Massachusetts Court.

Finally, the Opposition pointed out that it was the Plaintiffs' initiative to bring the present action while the Defendant's initiative had been to be

excused from the actions both in Texas and in Massachusetts.

What happened next was the basis for Plaintiffs' Petition for Writ of Mandamus.

On June 14, 1988 the District Court of Massachusetts issued a Memorandum and Order stating that the issues presented in the Massachusetts Court were identical to those issues pending among the same parties in the Texas action between Dyna-Go Properties, Inc. v. the US SBA. The Memorandum further stated that the Plaintiff was interpleaded as a third party defendant on February 5, 1988 but had not filed an Answer as yet. The Court further stated that it was clear <u>from the record</u> that all witnesses except the Plaintiff were located in Texas. In view of the above assertions, the Court then concluded that the Massachusetts action should be

transferred to Texas and so ordered. A copy of such Memorandum and Order appears in the Appendix at pages 1, 2 and 3, herein A 1.

Upon reading the above Memorandum, it quickly became clear that the Court had not seen the Plaintiffs' above Opposition filed in such Court 12 days earlier. Assertions in the Memorandum that the issues were identical in the two actions between the same parties and that the Plaintiffs had not filed an Answer to the US SBA's Interpleader Petition, highlighted the fact that such Opposition had not been brought to the attention of the Court before it issued the above Memorandum and Order and that the Plaintiffs had not been afforded a reasonable opportunity to present argument against such transfer.

On June 23, 1988 the Plaintiffs filed a Motion for Reconsideration of

the Transfer Order, (A.7) attaching a copy of the Plaintiffs' previously filed Opposition (A.12), stating that it appeared that the Plaintiffs' Opposition to the Defendant's Motion to Dismiss had not been brought to the Court's attention and further requested a hearing on the above Motion for Reconsideration of the Court's Order of Transfer. On about July 19, 1988 the Defendant SBA filed a response to Plaintiffs' Motion for Reconsideration in the form of a copy of the Texas Articles of Incorporation of ABC, Inc., but did not refute or otherwise respond to the discrepancies raised in the Plaintiffs' above Opposition or in their Motion for Reconsideration relative to e.g. the differences between the Massachusetts and Texas actions and the relative hardships of the parties were the action to be tried in Massachusetts

or Texas.

On July 20, 1988 the Court without giving the Plaintiffs a hearing, denied such Motion (A. 2), stating that the additional factors (of Plaintiffs' Opposition) do not alter the Court's conclusion that transfer is appropriate.

The Plaintiffs thereupon brought a Petition for Writ of Mandamus to the U. S. Court of Appeals First Circuit, requesting that that Court order the District Court to afford the Plaintiffs an opportunity to be heard as to why the present action should not be transferred from the District of Massachusetts.

In such Petition, the Plaintiffs presented the facts given above and the arguments given below in (j), including pointing out that in a similar case the U. S. Court of Appeals, 10th Circuit, granted a petition for Writ of Mandamus

and ordered the U. S. District Court, District of Wyoming, to grant the petitioners a hearing on the issue of venue transfer.

The U. S. Court of Appeals, First Circuit, however adhered to its contrary position set forth in a 1954 case, In re Josephson (infra), in which it did not find exceptional circumstances on the record to warrant mandamus relief per copy of Decision attached hereto at A. 1. That is, the Court of Appeals, First Circuit, ruled in effect that the Plaintiffs were not entitled to an opportunity to be heard on the issue of venue transfer.

In view of above-noted conflict between the U.S. Courts of Appeals in the 10th and 1st Circuits, the Plaintiffs bring this Petition for Writ of Certiorari under U.S. S.Ct. R 17.1(a). The Plaintiffs thus seek an

opportunity to be heard in the U. S. District Court of Massachusetts as to why the present action should not be transferred from the District of Massachusetts.

(i) Basis of federal jurisdiction:

In the U. S. District Court jurisdiction is based upon 15 USC 634(b)1 and 28 USC 1346(a) and 1402.

In the U. S. Court of Appeals First Circuit, jurisdiction is based upon 28 USC, 1651(a) and FRAP 21.

(j) Argument:

WHY THE WRIT SHOULD ISSUE

1.(a) DEFENDANT'S BURDEN RELATIVE TO TRANSFER OF VENUE

The Defendant US SBA in the above Texas action sought to interplead the Plaintiffs in the Massachusetts action, as an opponent for the Plaintiff Dyna-Go Properties, Inc. in the Texas action while requesting that such action be

dismissed as to it. Similarly, the Defendant US SBA has brought a Motion to Dismiss the present action as to it. That is, such Defendant sought only to be excused from both actions and did not, before the Order of Transfer, dated June 14, 1988, seek to transfer the present action to Texas.

However, it is established that the burden rests with the Defendant to establish that on balance, the interests of justice and convenience weigh heavily in favor of transfer. Securities and Exchange Commission v. National Student Marketing Corp., 360 F. Supp. 284 (1973). It has further been held that unless the Defendants carry their burden (re transfer) the Plaintiffs' choice of forum is entitled to considerable deference. Gulf Oil Corp. v. Gilbert, 380 US 501 (1947).

Here the Defendants did not even

advocate such transfer until its response to the Plaintiffs' Motion for Reconsideration on about July 19, 1988 and then only did so by a) attaching the Plaintiff corporation's Texas Articles of Incorporation and by affirming its reasons advanced in its Motion to Dismiss filed on May 17, 1988. There was no attempt to respond to the reasons advanced in the Plaintiffs' Opposition to such Motion, e.g. that different issues are pending among different parties in the two actions, that ABC, Inc. had been located in Massachusetts over a year, when the present action commenced and that a majority of the Board of Directors and the President and witnesses have always been residents of Massachusetts.

Accordingly the Defendant, in thus ignoring the Plaintiffs' Opposition and in not responding thereto, is not

believed to have carried its burden to establish that on balance, the interests of justice and convenience weigh heavily in favor of such transfer.

1.(b) RELATIVE CONVENIENCE OF PARTIES AND INTEREST OF JUSTICE

The applicable statute is believed to be 28 USC 1402(A.21) which reads in part:

a) Any civil action against the United States...may be prosecuted only:

1. Except as provided in paragraph (2) in a Judicial District where the Plaintiff resides.

2. In the case of a civil action by a corporation...in the Judicial District in which is located the principal place of business...of the corporation.

...Notwithstanding the foregoing provisions of this paragraph, a district court for the convenience of the parties and witnesses in the interest of justice may transfer any such action to any other district or division.

For reasons discussed below, it is believed that the general rule above and not the exception should have been followed, including the location of the

Plaintiffs, the location of witnesses and the limited finances of the Plaintiffs.

As indicated above, the Defendant rather than meeting the above burden in establishing the need for transfer has sought to be excused from the actions both in Texas and Massachusetts. Accordingly if the order transferring the present action to the Texas Court be allowed to stand, the Plaintiffs who have limited funds (as indicated by the Complaint), will be burdened with added expense and great inconvenience in pursuing this Complaint. The Defendant by contrast, has the unlimited resources of the U. S. Government including a Boston office and the U. S. Attorney's office in Boston and can readily transport it witnesses and a folder of documents to Boston as needed, with little hardship.

Further the Plaintiff corporation has no funds and cannot pay for the expenses of Plaintiff and other witnesses to travel to Texas, including plane fare, hotel and other expenses if the transfer order stand. The Plaintiffs could well be inconvenienced out of contention, while retaining the action in the Massachusetts Court would cause no great disruption to the Defendant's operations. Accordingly it is believed that the interests of justice and the balance of hardships weigh heavily in favor of retaining the present action where it originated, in the District of Massachusetts.

2. OPPORTUNITY TO PRESENT CASE RE VENUE TRANSFER

The District Court did not provide the Plaintiffs with an adequate opportunity to be heard on the Issue of Venue Transfer. As discussed above,

through some inadvertence the Plaintiffs' Opposition to Defendant's Motion to Dismiss was apparently not brought to the attention of the Court before it issued its Memorandum and Order of June 14, 1988. Thus, Plaintiffs were not only not heard in their opposition to the Defendant's above Motion, they were not even read.

Thereafter, on June 23, 1988 the Plaintiffs filed a Motion for Reconsideration to the Court's Order of Transfer, calling the Court's attention to such Opposition and asking for a hearing on such Motion for Reconsideration. As the record will show, the hearing was not granted and the Motion was met with a denial notation as noted above, per A.2.

The U. S. Court of Appeals, First Circuit, has held that a district court's discretion will not be disturbed

unless there is a firm conviction that the Court committed a clear error of judgment, In re Josephson, 218 F.2nd 174 (1st Cir. 1954). Thirteen years later in the 10th Circuit, the Court of Appeals held that mandamus is available to review the validity of a transfer order only upon "a clear showing of abuse of discretion", Texas Gulf Sulphur Co. v. Ritter, 371 F.2nd 145 (1967).

The question for the Court below in the Writ of Mandamus perhaps boiled down to whether lack of an opportunity to be read, followed by lack of opportunity to be heard, relative to an order of venue transfer amounted to a clear showing of abuse of discretion.

It has been held in a 1985 case, U.S. Court of Appeals (9th Cir.) that lack of an adequate opportunity to be heard on the issue of sanctions is an abuse of discretion, Fjelstad v.

American Honda Motor Company, 762 F. 2nd 1334 (1985). Here the District Court after imposing a $50,000 sanction against the Honda defendants, had subsequently denied the defendant's Motion for Reconsideration, refusing to allow them a hearing thereon. As indicated above, the above Court of Appeals then ordered that such hearing be permitted.

In a 1986 case, the petitioner sought a writ of mandamus compelling the District Court to transfer a case from the District of Wyoming to the Central District of California on grounds of convenience to witnesses. The Court denied such Motion without a hearing and did not give the petitioners a fair opportunity to establish that interest of justice and the convenience of the parties mandated a change of venue. The U.S. Court of Appeals (10th Cir.) then

ordered that the District Court grant the parties a full and adequate hearing on the subject of venue and granted their petition for writ of mandamus.

The Court thus held that mandamus will lie when a change of venue is denied without argument or opportunity for a hearing, Hustler Magazine v. U. S. District Court, 790 F. 2nd 69 (10th Cir. 1986).

Here the plaintiffs' case for mandamus is believed to have been stronger than that of the foregoing case in that the plaintiff's above Opposition was not read prior to the issuance of the Order for Transfer, which Order was thus based on erroneous information. Thereafter, plaintiffs' request for a hearing on the subject was not granted and the plaintiffs were thus not afforded an adequate and full opportunity to present their arguments

relative to convenience and interest of justice against transfer to a distant forum.

CONCLUSION

Here the decision of the 1st Circuit Court of Appeals is believed erroneous and in conflict with that of the 10th Circuit Court of Appeals relative to permitting a litigant a hearing on venue transfer as discussed above, and such decision is believed subject to review on Writ of Certiorari per U.S. S.Ct R 17.1(a).

Thus, Plaintiffs are believed entitled to an adequate opportunity to present arguments against transfer to a distant forum and as discussed above, since the Plaintiffs were not read and then were not heard,relative to the issuance of such transfer order, it is

believed that a Writ of Certiorari will lie to vacate or revoke the transfer order and permit the Plaintiffs an opportunity to be heard relative to retention of the above action in the District of Massachusetts

THE PLAINTIFFS

By: John J. Jennings
John J. Jennings
Counsel of Record

c/o Thomas C. Stover
13 Essex Street
Marblehead, MA 01945
January 30, 1989
(617) 631-1111

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-2013

IN RE AMERICAN BICYCLE COMPANY, INC.
and PAUL A. BURKE,
Petitioner.

Before
Campbell, Chief Judge,
Breyer and Torruella, Circuit Judges.

ORDER OF COURT

Entered November 4, 1988

The petition for writ of mandamus is denied. As a general rule, courts enjoy a broad measure of discretion in transfer matters. Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction sec. 3828 (1976). We have often stated mandamus is normally inappropriate in the absence of a clear abuse of discretion. We do not find any exceptional circumstances on this record

to warrant mandamus relief.

By the Court:

FRANCIS P. SCIGLIANO,

Clerk

By:Daniel F. Loughry

Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0690-MA

AMERICAN BICYCLE COMPANY, INC.
and PAUL A. BURKE, Plaintiffs

v.

UNITED STATES OF AMERICA,
Defendant

re: Plaintiffs' Motion for
Reconsideration (A.7)

DENIED: These additional factors do not alter my conclusion that transfer is appropriate and will lead to a complete reduction of all the issues among all parties.

A. David Mazzone

USDJ

7/20/88

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-0690-MA

AMERICAN BICYCLE COMPANY, INC.
and PAUL A. BURKE, Plaintiffs

v.

UNITED STATES OF AMERICA,
Defendant

MEMORANDUM AND ORDER

Mazzone, D. J. June 14, 1988

This matter is before the Court on the defendant's motion to dismiss. The defendant claims the plaintiffs have chosen a forum non-conveniens in filing this suit in the District of Massachusetts, and that the issues presented here are identical to those issues pending among the same parties in an earlier filed lawsuit now pending in the Southern District of Texas, Dyna-Co Properties, Inc. v. The United States Small Business Administration, Civil Action B-87-242 (November 3, 1987).

This plaintiff was interpleaded as a third-party defendant in that action on February 5, 1988, but has not filed an answer as yet. This action was filed on March 23, 1988.

It is clear from the record that all the negotiations involved in obtaining the subject loan occurred in the Southern District of Texas and while this plaintiff was conducting its business in that District. It is also clear that all witnesses in both cases except the plaintiff are located in Texas, the records of the SBA are in Texas, the loan was made there, and the cause of action arose in Texas. I conclude that for the convenience of the parties and witnesses, and in the interest of justice, this matter should be transferred to the Southern District of Texas - Brownsville Division, where all of the claims pending among all of

the parties can be most efficiently and fairly resolved. 28 U.S.C. sec. 1402(a)(2).

SO ORDERED.

A. David Mazzone

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 88-0690-MA

AMERICAN BICYCLE COMPANY, INC.
and PAUL A. BURKE, Plaintiffs

V.

UNITED STATES OF AMERICA,
Defendant

ORDER OF TRANSFER

MAZZONE, D.J.

In accordance with the Court's memorandum and order dated June 14, 1988 transferring this matter, it is hereby ORDERED that the above-entitled action be and hereby is transferred to the United States District Court for the Southern District of Texas - Brownsville Division.

By the Court,

June 16, 1988

Helen M. Costello
Deputy Clerk

THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 88-0690-MA

AMERICAN BICYCLE COMPANY, INC. }
and PAUL A. BURKE, Plaintiffs }
v. }
UNITED STATES OF AMERICA, }
Defendant }

MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF TRANSFER ON DEFENDANT'S MOTION TO DISMISS

Now come the Plaintiffs and move for reconsideration of the Court's Order of Transfer of the above action from this Court to the Southern District of Texas and ask for a hearing on the above Motion.

1. It appears that the Plaintiffs' Opposition to the Defendant's Motion was not brought to the Court's attention, since:

a) Plaintiffs' Opposition to the above Motion is not mentioned in the

Court's Memorandum and Order (dated June 14, 1988). A copy of the Opposition is enclosed herewith.

b) The Order states that the Plaintiff did not file an Answer in a case now pending in the Southern District of Texas, Dyna-Co Properties, Inc. v. the United States Small Business Administration, Civil Action No. B-87-242, while the Plaintiffs' above Opposition states the contrary and has appended a copy of such Answer to the Opposition as Exhibit B.

c) The Memorandum states that all the witnesses are in Texas except the Plaintiff, while the above Opposition states that several witnesses reside in Massachusetts.

d) Further in the Texas case, the Plaintiff and Lessor is a corporation, Dyna-Co Properties, Inc., while ABC,

Inc.'s lease was with an individual, Russell Harwood.

2. Further in the Texas action, Dyna-Co seeks rent payments from the SBA on an oral lease while in Massachusetts the Plaintiffs seek recovery from the SBA on certain promised loan proceeds, so that the same issues are not pending among the same parties but rather different issues are pending among different parties in the two actions.

3. Though American Bicycle Company, Inc. was conducting its business in Brownsville, Texas in the Summer and Fall of 1986, it has been located in Massachusetts for over a year. Further a majority of the Board of Directors and the President and other witnesses have always been residents of Massachusetts. Accordingly, the Plaintiffs brought the present action in the District of Massachusetts as it would be highly

inconvenient and expensive to conduct such action in Texas.

4. Further as set forth in the Opposition, the Defendant has sought the same result in both actions, to be excused therefrom.

5. Alternatively, if the Defendant were successful in transferring the present action to the Texas Court, the Plaintiffs who have limited funds (as indicated by the Complaint) would be burdened with added expense and inconvenience in pursuing this Complaint. The Defendant, by contrast, has the unlimited resources of U. S. Government, including the U. S. Attorney's Office in Boston; all as more fully set forth in the Plaintiffs' Opposition attached.

6. Further, it is the Defendant's default in withholding promised funds to the Plaintiff, ABC, Inc., that caused

this action and it should not be rewarded by transferring this action to its locale.

Accordingly, it is moved that the above Transfer Order be reconsidered and that this action proceed, where it originated, in this Court.

THE PLAINTIFFS,

By:_____

Thomas C. Stover
13 Essex Street
Marblehead, MA 01945
(617) 631-1111

June 23, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
88-0690-MA

AMERICAN BICYCLE COMPANY, INC. and PAUL A. BURKE, Plaintiffs

v.

UNITED STATES OF AMERICA, Defendant

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The Plaintiffs oppose the Defendant's Motion to Dismiss on the following grounds:

1. The co-pending action of Dyna-Co Properties, Inc. v. United States SBA, Civil Action B-87-242, filed November 3, 1987, in the Southern District of Texas, Brownsville, Texas, as clearly set forth therein, has to do with an oral month-to-month lease alleged between Dyna-Co and the USSBA after December 15, 1986. Accordingly any lease between

Dyna-Co and ABC, Inc., which terminated December 15, 1986 is not in issue in that action. Even if such lease were an issue, the Plaintiff in the present action has no lease with Dyna-Co Properties, Inc., a corporation, but with Russell Harwood, an individual, per copy of the lease attached hereto as Exhibit A.

2. The Plaintiffs in this action have pointed out this discrepancy in such prior action in their Answer thereto, a copy of which is attached hereto as Exhibit B.

3. The issues are different in the two actions. The first action concerns a dispute over an oral lease between the parties in that action, whereas the present action concerns a failure of the Defendant to provide all the monies promised under a loan agreement to the Plaintiffs herein.

Again, the present Plaintiffs cannot be interpleaded in the prior action because ABC has no lease agreement with the Plaintiff in that action.

4. Further, the present action was in preparation well before March 3, 1988 and was in no way prompted by Dyna-co's action on an oral lease but by funds promised by the Defendant and later denied the Plaintiffs.

Though American Bicycle Company was conducting its business in Brownsville, Texas in the Summer and Fall of 1986, it has been located in Massachusetts for over a year. Further, the majority of the Board of Directors and the President and other witnesses have always been residents of Massachusetts. Accordingly, the Plaintiffs brought the present cause of action in the District Court of Massachusetts as it would be highly inconvenient and expensive to

conduct such action in Texas.

5. It is the Defendant who is trying the back-door approach in this case. The Defendant never commenced an action against the Plaintiff in Texas or in any other forum, but have only reacted when they were sued, first by Dyna-Co Properties, Inc. in Texas over an oral lease agreement (and erroneously have attempted to interplead the Plaintiffs as noted above) and second, have reacted when sued by the Plaintiffs in the present action on a different subject, for reneging on a promise to loan certain funds. In each case the Defendant has sought the same result, to be dismissed from both actions.

6. The Defendant takes an inconsistent position in that

a) in the first action, it prays for a dismissal from the Texas action. That is, it merely seeks to bring the present

Plaintiffs into the Texas action while making its exit.

b) In the second action, the present one, the Defendants again seek a dismissal, so that if the Defendants are successful in both actions, there will be no cause of action between the parties anywhere.

7. Alternatively, if the Defendant were successful in transferring the present action to the Texas Court, the Plaintiffs, who have limited funds (as indicated by the Complaint), would be burdened with added expense and inconvenience in pursuing this Complaint.* The Defendant, by contrast, has the unlimited resources of the U. S. Government, including the U. S. Attorney's office in Boston in the same

* The Plaintiff Burke has never received any salary as President of ABC, Inc.

building as this Court, so that the Defendant's hardship is comparatively much the lesser.

Accordingly, the balance of hardships in the present action, the differences in the issues and in the parties are believed to call for denial of the Defendant's Motion to Dismiss. This is particularly so when it is remembered that the Plaintiffs' initiative has been to bring the present action, while the Defendant's initiative has been to be excused from actions both in Texas and in Massachusetts.

The Defendant quotes a portion of 28 USC 1402(a)(2) relative to transfer of an action from one venue to another. However, looking at the larger context of the statute, one reads that:

> a) Any civil action against the United States....may be prosecuted only: 1) except as provided in paragraph (2), in the Judicial District where the Plaintiff resides.

2) In the case of a civil action by a corporation...in the Judicial District in which is located the principal place of business...of the corporation.

This is the general rule. The portion quoted by the Defendant is the last sentence of para. (2) above, which states:

Notwithstanding the foregoing provisions of this paragraph a District Court for the convenience of the parties and witnesses in the interest of justice may transfer any such action to any other district or division.

For the reasons discussed at length above, it is believed that the general rule and not the exception should be followed, including the location of both Plaintiffs, location of several witnesses and the limited finances of the Plaintiffs.

For these and the other reasons discussed above, in the interest of justice, it is believed only proper that this action proceed where it originated;

in the Commonwealth of Massachusetts.

WHEREFORE, the Plaintiff respectfully requests this Court to deny the Defendant's Motion to Dismiss the present action. He further prays for any and all reasonable attorney fees and costs incurred in the defense of such Motion.

Respectfully submitted,

THE PLAINTIFFS

By:_____

Thomas C. Stover
(617) 631-1111
13 Essex Street
Marblehead, MA 01945

June 2, 1988

Pertinent Excerpts of Statutes and Regulations

15 USC 634. General powers

Powers of Administrator

(b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may --

(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy;

28 USC 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USC 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the

United States, or for liquidated or unliquidated damages in cases not sounding in tort,

28 USC 1402. United States as defendant

(a) Any civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the judicial district in which is located the principal place of business or principal office or agency of the corporation.... Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

28 USC 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 USC 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any

judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

U.S. S.Ct. RULE 17
CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ on certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

FRAP 21.

(a) MANDAMUS OR PROHIBITION TO A JUDGE OR JUDGES; PETITION FOR WRIT; SERVICE AND FILING. Applications for a writ of mandamus or of prohibition directed to a judge or judges of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in trial court. The petition shall contain a statment of the facts necessary to an understanding of the issues presented by the application; a

statement of issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) DENIAL; ORDER DIRECTING ANSWER. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Petition for Writ of Certiorari, as amended on February 9, 1989, were served by depositing same in a United States Post Office, with First Class postage, prepaid, addressed to the U. S. Solicitor General, Department of Justice, Washington, D. C. 20530, Attorney for Respondent, this 15th day of February, 1989. The Respondent is the only party required to be served.

THE PETITIONERS,

By: John J. Jennings

John J. Jennings
Counsel of Record